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ABSTRACT

The nation-state system, legitimized in 1648 by the Peace of Westphalia, is still sufficiently viable for a sovereign state's claim to its right to manage its internal affairs to be internationally respected. Among matters included in the categories immune from external intervention is that of a state's treatment of its own nationals. Since the framing of the United Nations Charter, however, world attention has focused on the mistreatment of ethnic groups. In the cases of both South Africa and Rhodesia, the international community has registered the decision that mistreatment of ethnic minorities, more than any other category of state action, results in the denial of the protection of state sovereignty. While action against the racial policies of South Africa has mostly consisted of public discussion and investigation, in the case of Rhodesia, economic boycott has been invoked in efforts to abolish what is widely regarded as an illegal, racist regime. In addition to bringing about concrete political changes, particularly in Rhodesia's government, United Nations actions have demonstrated that the old Westphalian concept of virtually absolute state sovereignty no longer holds. (Author/GC)

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RACIAL DISCRIMINATION AS A PRIMARY IMPETUS FOR INTERNATIONAL ACTIONS OVERRIDING THE SOVEREIGNTY OF STATES

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A recent New Yorker cartoon shows two diplomats walking away from a multi-ethnic group in the United Nations lobby. As the group scowls and glares after them, one diplomat says to the other: "Honestly! Some days you can't say anything to anybody that isn't construed as interference in the internal affairs of sovereign nations!" [1] Our sovereign state system was legitimized by the Peace of Westphalia in 1648. A state's entitlement to treat its nationals at discretion was among the principles recognized then. Unless a state voluntarily entered into treaty obligations regarding such treatment, the manner in which it treated its nationals was not a matter of concern to international law or other states.[2]

Although the League of Nations organization moved in the direction of curtailing state discretion in a few matters, a state's treatment of its own nationals was still firmly included in a 1930 list of matters within domestic jurisdiction,[3] the latter term being used interchangeably with internal affairs.

After the second world war, states began to accept more readily the concept that no state conflict threatening or breaching international peace and security, as distinguished from internal peace and security, would remain within their unfettered jurisdiction. When the San Francisco Conference met to establish a United Nations organization with authority to eradicate the underlying causes of war, it

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laid the groundwork for further modification of the Westphalian arrangment of sovereign states, for underlying causes of war tend to be internal to a state. Flagrant racial discrimination can be as readily classified as an underlying cause of war as an internal matter related to a state's treatment of its own nationals.

The change regarding the classification of racial discrimination as a matter of international concern did not come quickly, for sovereign states acting individually since 1945 have aggressively resisted what they did collectively at San Francisco. As the New Yorker cartoon demonstrates, state opposition to external interference in matters close to home has become such a burning public issue in 1979 that it has transformed a relatively esoteric topic of international law into the subject of a cartoon that the New Yorker editors apparently expected a great number of readers to recognize and comprehend without a moment's hesitation.

Since 1945 the United Nations has faced the objection that international discussion and resolutions for settlement of a variety of issues intervenes in domestic jurisdiction. Most of these issues can be put into one of three categories: (1) East-West conflicts between the Soviet bloc and the western democracies, (2) independence for colonial areas, and (3) racial discrimination. Any one of these three categories can be related to the list of matters generally regarded as domestic, with state policies providing for racial discrimination falling within the domestic category of a state's treatment of its nationals.

During this time state objections of domestic jurisdiction have not served as effective barriers to the limited kinds of actions that an international organization can take. But it is in relation to state pleas of domestic jurisdiction in situations in which a state has engaged in flagrant and consistent racial discrimination that the assault on state sovereignty was most effectively made and in which the rationale for modifying the Westphalian system was developed. This de-

velopment took place during discussions on South African apartheid policies and the Ian Smith regime in Zimbabwe Rhodesia.[4]

The development of a rationale for international jurisdiction regarding the racial policies of these two countries brings into focus two bases for international jurisdiction that have already been suggested. First, if a matter becomes the subject of a binding international rule, it ceases to be domestic. A binding rule may be expressed in customary international law, treaties, or, according to more recent opinion, in resolutions passed by United Nations bodies.[5] Second, if a matter threatens international peace and security, it becomes a matter of international concern.[6]

The Union of South Africa Racial Policies

An elaboration of the doctrine of international concern began when India brought the first racial discrimination case to the first session of the General Assembly under the heading of treatment of Indians in the Union of South Africa.[7] A few years later India and other Asiatic countries brought an additional charge concerning the South African policy of apartheid. The arguments that international tensions created by these policies were so grave and caused such imminent threats to peace have grown increasingly passionate. India initially charged that the reactions in India to the South African policy had been "so serious" that India had to terminate trade agreements and recall its High Commissioner" and that the question was "a political one and not a legal one."[8] Because few people at that time believed that existing international statements on human rights and racial discrimination were legally binding on states, India wisely de-emphasized its references to law. In the third session of the General Assembly, the Indian dele-

gate referred to the "very tense situation" created by the African policy and the "gravest consequences" of it outside Africa.[9]

Thirteen Asiatic countries joined in bringing the issue to the seventh session, calling it "a dangerous and explosive situation" and "a flagrant violation of basic principles of human rights."[10] The Indian delegate spoke of "a dangerous tension" and "widespread indignation."[11] In the thirteenth session of the General Assembly Ghana introduced the apartheid question by saying that since racialism was a threat to the very foundations of international peace and security, no member of the United Nations should be allowed to prevent discussion on the question on the pretext that it was domestic. He termed the South African policy an "affront to the conscience of the civilized world" that had "repercussions on race relations everywhere." He wondered if anyone could continue to doubt that the question of race conflict had become "such a threat to the peace as to constitute a matter of international concern."[12] In the following session the delegate of Ghana increased the attack as he opened the debate again and assumed the role of spokesman for the oppressed groups. He said that the Africans in South Africa had had enough of apartheid.[13] In the fifteenth session the Nigerian delegate said that the patience of his government was exhausted and that racial discrimination could never be regarded as being within domestic jurisdiction.[14]

During the years of discussion of its racial policies, the Union of South Africa denied international jurisdiction, invoking the Westphalian principle that it had entered into no binding legal obligations to treat its nationals in any specified way and that it thus was a matter to be handled at South African discretion. In 1955, the South African delegate went to the length of walking out of the meeting of the General Assembly when the racial policies were placed on the agenda. The South African argument has had little or no effect; the cause was too

unpopular to gain any significant support. On the contrary, the South African position became less respected with each passing year as the other members of the United Nations increased their criticism and firmed up their resolve against accepting the proposition that racial discrimination policies are within the sole discretion of any state.

In an earlier period when dealing with less inflammatory issues, the members of the League of Nations had been much more reluctant to brush aside pleas of state sovereignty. Although narrow and legalistic pleas of domestic jurisdiction in no case served as a bar to international action, a more general invocation of the concept of domestic jurisdiction appears to have "operated as an effective brake whenever any considerable expansion of the sphere of activity of the League was proposed."[15] Although there was sentiment for treating slavery as an international question, individual members from time to time opposed League activities in such matters as child welfare, unemployment, tariffs, status of women, broadcasting, exploitation of natural wealth, penal administration, and amnesty.[16] In addition to the fact that the United Nations Charter and subsequent treaties and conventions have opened up some of these topics for international action, the fact that the world community has rolled back state discretion in relation to the galvanizing issue of racial discrimination makes the assumption of jurisdiction over other issues easier.

The Rhodesian Case

Although the South African racial policies continue to be the subject of discussions in the United Nations, they have added nothing new to the status of state sovereignty. It was not until the Rhodesian case that the removal of racial discrim-

ination was assumed to have been accomplished by the development of new international law on that subject. This change was stated in an atmosphere clearly distinguishable from the earlier proposition that an "emergency" jurisdiction is created by the grave international repercussions of a situation. This shift from "emergency" jurisdiction to jurisdiction based on new law has not been sudden. The arguments of opposing states have advanced both points in all cases. The distinction is one of emphasis. In the earlier cases, the majority spoke of the gravity and urgency of the situation and the overriding need for the organization to maintain peace. In the Rhodesian case, the initial emphasis was on the international legal obligations that states now have. Calls for maintenance of world peace were usually coupled with suggestions that stronger enforcement measures were required.

Challenges to international jurisdiction in the Rhodesian case were brushed aside by decision-making majorities intent on negotiating the passage of resolutions with sufficient force to bring about the collapse of the "illegal racist minority regime" of Prime Minister Ian Smith. In addition to the factors of racial discrimination and an undemocratic political system that placed control in the hands of a white minority, there was the issue of the colonial status of the territory as the question was taken up by the United Nations. Although disposition of territory had traditionally been within domestic jurisdiction, the Declaration on the Granting of Independence to Colonial Countries and Peoples was already in force when the Smith regime declared the independence of Rhodesia on November 11, 1965. All of this combined to provide an atmosphere in which legalistic arguments against international jurisdiction carried little weight. The serious debate passed over the question of international competence and concentrated on the justification of sanctions capable of bringing about a change in the government in Salisbury.

Application of the doctrine of international concern was barely discernible in justifications of international competence over the Rhodesian issue before November 11; after that date the considerable attention given to international repercussions to be expected was not aimed at the jurisdictional question. The situation was finally declared a threat to the peace, not to circumvent prohibitions against international interference in the internal affairs of Rhodesia but to make available the sanctions of Chapter VII of the Charter which authorizes economic sanctions, severance of diplomatic relations, and the use of air, sea, or land forces of members of the United Nations to restore peace.

As the movement for decolonization swept through the world, the British government granted independence to territories surrounding Rhodesia that had achieved majority rule, but the policy of apartheid practiced by the government in Salisbury led the British to reject that course for Rhodesia.[17] As the negotiations between London and Salisbury broke down and the Smith government moved toward a unilateral declaration of independence, the Council, Assembly, and the Assembly's Special Committee repeatedly exercised competence over the matter. In a resolution passed in the month preceding the Rhodesian declaration of independence, the General Assembly expressed concern over the perpetuation of a minority rule which would be incompatible with the principle of equal rights and self-determination of peoples proclaimed by the Charter and the Declaration of 1960 and called upon the United Kingdom to take all possible measures to prevent a unilateral declaration of independence and, in the event of such a declaration, to take all steps necessary to put an end to rebellion.[18] When the issue shifted from blocking Rhodesian plans for a declaration of independence to bringing pressure to defeat a form of government that the majority of United Nations members found obnoxious, the motivation was

less elusive. The General Assembly and Security Council immediately passed brief resolutions condemning the "unilateral declaration of independence made by a racist minority in Southern Rhodesia."[19]

With the jurisdictional question behind it, the United Nations moved on to examine the threat to peace caused by the illegal racist regime in order to justify the sanctions against Rhodesia. In a resolution to institute severance of diplomatic and economic relations between members and Rhodesia, and particularly to embargo shipments of oil and petroleum products to the latter, the Council determined that the situation resulting from the declaration of independence was "extremely grave and that its continuance in time constitutes a threat to international peace and security."[20] In the following Spring, the Council was in a mood to employ more effective measures to stop the shipments of oil to a rebel government that had not collapsed as soon as expected. A resolution passed at the request of the United Kingdom determined that the situation resulting from supplies of oil which would enable the "illegal regime" to "remain longer in being" would "constitute a threat to peace." In addition to calling upon Portugal and other states to divert oil destined for Rhodesia, the Council called upon the United Kingdom to use force if necessary and empowered that government to arrest tankers bringing in oil.[21]

In December 1966, the Council extended its call for selective mandatory sanctions on critical commodities. At the suggestion of the United Kingdom it specified that it was acting under Articles 39 and 41 of Chapter VII of the Charter, which limit the Council to measures not invclving the use of armed force.[22] Noting that economic sanctions had failed to "bring down the racist regime," the General Assembly in November of 1967 condemned the United Kingdom for failing to take more effective measures and called for the employment of all measures, including the use

of force, to put an end to the Smith regime.[23] After a protracted consideration of the ineffectiveness of past measures, the Council, in May of 1968, voted comprehensive mandatory economic sanctions.[24]

Conclusions

The gap between United Nations aspirations to eradicate racial discrimination and its capacity to do so is vast. But lack of effectiveness does not erase legal competence and failure to achieve immediate results does not mean that no progress has been made. Ian Smith is no longer Prime Minister in Rhodesia and recent talks in London among the parties immediately concerned are attempting to establish a government there that would provide for majority rule without a veto for the white minority. In the United States President Carter resists pressures to end the embargo on trade with Rhodesia and the Congress included a proviso preventing the Export-Import Bank from extending credit for any export that would contribute to South Africa maintaining or enforcing apartheid.[25]

The South African and Rhodesian cases do show, however, that in situations involving racial discrimination the United Nations members have been especially convinced that the old Westphalian concept of virtually absolute state sovereignty no longer holds. At the time of the South African discussions described here, they used the device of declaring the situation a threat to peace or a potential threat to peace in order to justify international action. During the later discussions of the Rhodesian case, the world community had moved ahead to formalize binding legal obligations on states in racial discrimination and other human rights matters. Assuming jurisdiction in the Rhodesian case on the basis of these new international legal rules, the United Nations employed the threat to the peace con-

cept to move from simple resolutions calling upon offending parties to mend their ways to resolutions calling upon other members to employ sanctions to pressure the offending parties to end discrimination. It is not likely that any issue other than racial discrimination would have served to mobilize so much willingness to modify the traditional sanctity of state sovereignty. But now that the precedent has been established in a series of cases that excited so much of the world, it is likely to applied in other modifications of the Westphalian state system.

FOOTNOTES

1. The New Yorker, July 2, 1979, p. 32.
2. For a good description of the Westphalian state system as it affects the related subject of human rights, see Eric Lane, "Demanding Human Rights: A Change in the World Legal Order," 6 Horstra Law Review (Winter 1978), 269-295.
3. J. L. Brierly, The Law of Nations, (Oxford at the Clarendon Press, 1930), 53-54. Four other items were: (1) foreign economic and financial policies, such as tariffs and loans; (2) migrations; (3) determination of internal political, economic, and social life in such matters as form of government, disposition of colonies, or respect for private property; and (4) nationality laws.
4. When Northern Rhodesia became Zambia, the remainder of Rhodesia was for a time called Southern Rhodesia. Recently it has been called Zimbabwe Rhodesia.
5. See Jung-Gun Kim, "Validity of the General Assembly Resolutions: An Inquiry," in Jung-Gun Kim and John M. Howell, Conflicts of International Obligations and State Interests, (The Hague: Martinus Nijhoff, 1972), 19-20.
6. John M. Howell, "Domestic Questions in International Law," Proceedings of the American Society of International Law, 1954, 90-99; Howell, "A Matter of International Concern," 63 American Journal of International Law (1969), 771-782.
7. Article 11 of the League of Nations Covenant declared that any war or threat of war was a "matter of concern of the whole League," but the concept was largely undeveloped during the League period. A beginning in the development of this concept was made when the United Nations discussed the relationship of United Nations members with the Franco regime in Spain, but it was the perennial racial discrimination question in South Africa that fully developed the concept.

8. GAOR, First Session, Part 2, Joint Committee of the First and Sixth Committees, 3, 52-53.

9. GAOR, Third Session, Part 2, First Committee, 258.

10. GAOR, Seventh Session, Vol. II, Annexes II, Agenda Item No. 66, p. 2.

11. GAOR, Seventh Session, Vol V, Ad Hoc Political Committee, 67-68.

12. GAOR, Thirteenth Session, Vol. 2, Plenary, 7.

13. GAOR, Fourteenth Session, Vol. IV, Special Political Committee, 67-68.

14. GAOR, Fifteenth Session, Vol. IV, Part 1, Special Political Committee, Part 2, 41.

15. Lawrence Preuss, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction," 74 Recueil des Cours (1949),570.

16. John M. Howell, "Domestic Jurisdiction," in Robert R. Wilson (ed.), The International Law Standard and Commonwealth Developments (Durham: Duke University Press, 1966), 143-144.

17. Ralph Zacklin,"Challenge of Rhodesia," International Conciliation (November 1969), 32.

18. A/Res. 2012 (XX), 12 October 1965.

19. A/Res. 2024 (XX), 11 November 1965; S/Res. 216, 12 November 1965.

20. S/Res. 217, 20 November 1965.

21. S/Res. 221, 9 April 1966.

22. S/Res. 232, 16 December 1966.

23. A/Res. 2262 (XXII), 3 November 1967.

24. S/Res. 253, 29 May 1968.

25. Newsweek, September 24, 1979, pp. 49-52; Congressional Quarterly Weekly Report, October 28, 1978, p. 3163.